

IN THE SUPREME COURT
OF THE UNITED STATES

NO. ^{MAY TERM, 1979}
78-1709

Supreme Court, U. S.
FILED

MAY 14 1979

MICHAEL ROSAK, JR., CLERK

TERRY ROBERT JACKSON,

and

STANLEY CECIL WEST,

Petitioners,

-VS-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

RONALD K. OWEN,
Attorney for Petitioners

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1961 N. Druid Hills Road, NE
Atlanta, GA 30329
404/321-7733

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To the Honorable Warren Burger, Chief Justice of
the United States of America and to the
Associate Justices of the Supreme Court of
the United States of America:

This is a petition by TERRY ROBERT JACKSON
and STANLEY CECIL WEST for a writ of certiorari
to review a judgment of the Court of Appeals of
the State of Georgia, and of the Superior Court of
Fulton County, Georgia, entered in this case.

I. OPINIONS DELIVERED IN COURTS BELOW

The Supreme Court of Georgia refused writ of
certiorari as to the opinion of the Court of
Appeals of Georgia, but did not write an opinion.
The opinion of the Court of Appeals of Georgia is
reported at 145 Ga.App. 526, 244 S.E.2d 49. A
copy of the slip opinion of the Court of Appeals
of Georgia is attached hereto as Exhibit "A" to
the Appendix to this Petition. A copy of the
Order of the Superior Court of Fulton County
denying Petitioners' Extraordinary Motion for New
Trial is attached hereto as Exhibit "C" to the

Appendix to this Petition.

II. JURISDICTION

The date of the judgment sought to be
reviewed is February 12, 1979. On that date, the
Superior Court of Fulton County denied
Petitioners' Extraordinary Motion for New Trial.
Under the applicable Georgia law, Georgia Code
Annotated §70-303, the granting or denial of an
Extraordinary Motion for New Trial is a matter
solely within the discretion of the trial judge.
Therefore, the denial of Petitioners'
Extraordinary Motion for New Trial is a decision
in the highest state court in which a decision
could be had. Following the denial of the
Extraordinary Motion for New Trial, Petitioners
had no further avenues for appellate review
within the Courts of the State of Georgia. The
jurisdiction of this Court is therefore invoked
pursuant to Title 28, United States Code, Section
1257(3) inasmuch as Petitioners claim that the
decisions of the courts of the State of Georgia

have the effect of denying Petitioners' rights under the Constitution of the United States.

III. QUESTIONS PRESENTED

1. Whether the refusal of the District Attorney to produce certain documentary evidence upon Petitioners' Notice to Produce denied Petitioners' rights to due process of law under the Fifth and Fourteenth Amendments.
2. Whether the trial court's denial of Petitioners' Motion for Continuance denied Petitioners' rights to due process of law under the Fifth and Fourteenth Amendments.
3. Whether the refusal of the District Attorney to produce certain documentary evidence upon Petitioners' Notice to Produce denied Petitioners' rights under the Sixth Amendment to confront the witnesses against them.
4. Whether the trial court's denial of Petitioners' Motion for Continuance denied Petitioners' rights under the Sixth Amendment to confront the witnesses against them.

IV. CONSTITUTIONAL PROVISIONS INVOLVED

The questions raised in this petition involve the following Constitutional provisions:

1. Fifth Amendment to the Consitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation. [Emphasis added.]

2. Sixth Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused

shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense. [Emphasis added.]

3. Fourteenth Amendment to the Constitution of the United States (Section 1.):

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws.
[Emphasis added.]

V. STATEMENT OF THE CASE

On or about March 25, 1977 Petitioner Terry Robert Jackson (herein referred to as "Petitioner Jackson") was indicted by the Fulton County, Georgia Grand Jury upon charges of aggravated assault and armed robbery arising from a shooting incident in the parking lot of an Atlanta, Georgia nightclub. Thereafter, on or about May 13, 1977, Petitioner Stanley Cecil West (herein referred to as "Petitioner West") was indicted on charges of aggravated assault and armed robbery arising out of the same incident. Without prior notice to Petitioner West, the cases were set down for trial together before the Superior Court of Fulton County, Georgia on May 24, 1977.

The prosecution's case against Petitioners depended almost solely upon the testimony of James Frazier and Sharon Elaine Hamilton, the two other participants in the shooting incident. It is and

was the contention of Petitioners that James Frazier and Sharon Elaine Hamilton started the incident by drawing guns and opening fire upon Petitioners. James Frazier and Sharon Elaine Hamilton, on the other hand, testified that Petitioners were the first to draw guns and begin firing. (Transcript, pages 84, 89, 145, 147 [hereinafter cited T:84, 89, 145, 147.])

Under the circumstances of the case, the credibility of James Frazier and Sharon Elaine Hamilton was certainly material to the guilt or innocence of Petitioners, for unless a jury believed the testimony of James Frazier and Sharon Elaine Hamilton, then Petitioners could not have been convicted of the crimes with which they were charged.

On or about May 20, 1977, counsel for Petitioners served a Request for Production of Evidence upon the Fulton County, Georgia District Attorney seeking, inter alia, F.B.I. "Rap Sheets" showing prior criminal arrests and convictions of

James Frazier and Sharon Elaine Hamilton, the prosecution's principal witnesses. (Appellate Record, page eleven (11) [hereinafter cited R: 11.]). In response to Petitioners' Request for Production of Evidence, the District Attorney provided a rap sheet for witness James Frazier. The rap sheet for witness James Frazier revealed that he had been convicted of numerous crimes involving moral turpitude.

The District Attorney refused to provide an F.B.I. rap sheet on witness Sharon Elaine Hamilton on grounds no such rap sheet was in the files of the District Attorney. Prior to the trial of the case, counsel for Petitioners made a Motion for Order on Discovery, asking that the Court order the District Attorney to obtain and provide a rap sheet for witness Sharon Elaine Hamilton. [T:3-8.] The Motion was denied. [T:26.]

Prior to the trial of the case, counsel for the Petitioners moved for a continuance in order that he might have time to gather certified copies

of the prior criminal convictions of witness James Frazier, [T:8-9.] because under Georgia law of evidence, the only permissible means of impeaching a witness by evidence of prior criminal convictions is to introduce certified copies of the criminal convictions into evidence. This Motion was denied. [T:26.]

Petitioners' Motion for Order on Discovery raised the issue that the failure of the District Attorney would be violative of Petitioners' rights to due process under the Fifth and Fourteenth Amendments. [R:12 ; T:6-8.] Petitioners' Motion for Continuance was also sought upon grounds that, unless a continuance were granted, Petitioners would be denied the fair trial required under the due process clauses of the Fifth and Fourteenth Amendments. [T:8-9;23.]

The cases went on to trial before a jury commencing on May 24, 1977. May 26, 1977, a verdict was returned finding both Petitioners guilty of armed robbery and aggravated assault.

On November 28, 1977, appeal was timely made before the Court of Appeals of Georgia. In their appeal, Petitioners assigned error, inter alia, that the refusal of the District Attorney to provide a rap sheet for Witness Sharon Elaine Hamilton was a violation of Petitioners' Constitutional rights to due process. [R:Append.] On February 16, 1978, the Georgia Court of Appeals ruled that the District Attorney is not required to obtain a rap sheet which he does not already have in his files. [See Appendix A.]

On March 13, 1978, Petitioners timely filed a Motion for Rehearing in the Court of Appeals of Georgia, again urging that the failure to order the discovery sought, and the failure to grant a continuance constituted violations of Petitioners' right to due process under the Fourteenth Amendment. [R:Append .] On March 31, 1978, this Motion for Rehearing was denied.

On April 28, 1978, Petitioners timely filed an application to the Supreme Court of Georgia for

Writ of Certiorari, upon grounds the failure to order the discovery sought and the failure to grant a continuance, constituted violations of Petitioners' right to due process under the Fourteenth Amendment. [R:Append .] Certiorari was denied by the Supreme Court of Georgia on May 18, 1978

On November 28, 1978, Petitioners filed an Extraordinary Motion for New Trial in the Superior Court of Fulton County, Georgia upon grounds that the failure to order the District Attorney to obtain an F.B.I. rap sheet on witness Hamilton, and the failure of the court to grant a continuance long enough for competent impeaching evidence to be obtained, constituted a denial of Petitioners' right under the Sixth Amendment to be confronted with the witnesses against them. [See Appendix B .] The Extraordinary Motion for New Trial was denied by the Superior Court of Fulton County on February 12, 1979.

Under applicable Georgia law, Georgia Code

Ann. §§70-301 and 303, the granting or denial of an Extraordinary Motion for New Trial is a matter within the exclusive discretion of the trial court. Therefore, after the denial of Petitioners' Extraordinary Motion for New Trial, Petitioners have no further avenues for pursuing appeal within the Courts of the State of Georgia. This Petition for Writ of Certiorari is timely brought within ninety (90) days after the entry of the final judgment herein.

VI. ARGUMENT AND CITATION OF AUTHORITY

1. The refusal of the District Attorney to obtain and produce an F.B.I. rap sheet on one of the chief prosecution witnesses constituted a denial of Petitioners' rights to due process under the Fourteenth Amendment.

Prior to the trial of this action, Petitioners served a Notice to Produce upon the District Attorney requesting that he produce an F.B.I. rap sheet on Sharon Elaine Hamilton, one of the two chief witnesses for the prosecution. The

District Attorney refused to produce such a rap sheet on grounds he did not have one in his files. The trial court denied Petitioners' motion for an order requiring the District Attorney to obtain and produce the rap sheet.

It was the purpose of Petitioners, in seeking to obtain the rap sheet, to seek evidence of the suspected prior convictions of Sharon Elaine Hamilton of crimes involving moral turpitude. Under Georgia law, the testimony of a witness may be impeached by presentation of competent evidence of conviction of crimes involving moral turpitude. Ga. Code Ann. §38-1804; Taylor v Marsh, 107 Ga. App. 575, 130 S.E.2d 770(1963), et al. However, under existing Georgia authority, a witness may be impeached only by the introduction of authenticated copies of the convictions of the witness. Rolland v State, 235 Ga. 808, 221 S.E. 2d 582(1976); Rewis v State, 109 Ga.App. 83, 134 S.E.2d 875(1964). Therefore, in order to impeach the testimony of Sharon Elaine Hamilton in this

manner, counsel for the Petitioners needed information prior to the trial as to her criminal record, so that authenticated copies of her convictions, if any, could be brought to the trial and introduced into evidence.

Essentially this case was founded upon the testimony of James Frazier and Sharon Elaine Hamilton. They testified that Petitioners committed an armed robbery and fired the first shot or shots in an ensuing gun battle. Petitioners testified that no robbery took place, and that James Frazier and Sharon Elaine Hamilton were the aggressors in the gun battle. Evidence which goes to the credibility of the testimony of a chief prosecution witness is certainly relevant and material. If a chief prosecution witness has been convicted of a crime or crimes involving moral turpitude, evidence of those convictions is certainly favorable to the accused, for it may cause the jury to disbelieve the case made against the accused. In the case at Bar, evidence of

Sharon Elaine Hamilton's prior criminal convictions would certainly have been material to the guilt of Petitioners; because, if her testimony were not believed, the jury might well have determined that Sharon Elaine Hamilton herself was guilty of the crimes alleged, and not Petitioners.

In the case of Brady v Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed 2d 215, this Court clearly stated that it violates due process under the XIV Amendment for a State to deny a defendant access to all exculpatory matters within the knowledge of the State. "The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or punishment." Moore v Illinois, 408 U.S. 786, 795, 33 L.Ed 2d 706, 92 S.Ct. 2562. Petitioners contend that, in the case at Bar, the prosecution has suppressed evidence favorable to Petitioners and material either to guilt or punishment.

It is a matter of record that, in the case at Bar, counsel for the Petitioners made a specific request for the production of the rap sheet on Sharon Elaine Hamilton. The evidence requested would have impeached the testimony of an important prosecution witness, reducing her credibility, and thus reducing the weight of the evidence presented by the prosecution. Petitioners submit that evidence which undermines or reduces the weight to be accorded to prosecution evidence is, by any logical analysis, favorable to the accused. Petitioners further submit that evidence of prior criminal convictions of a chief prosecution witness is clearly "material to guilt or punishment." In this case, evidence which might have caused the jury to disbelieve Sharon Elaine Hamilton might have, and probably would have changed the outcome on the issue of guilt of any or all of the crimes for which Petitioners were convicted, or the punishment accorded them. "A fair analysis of the holding in Brady indicates

that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." United States v Agurs, 427 U.S. 97, 104, 96 S.Ct.2392, 49 L.Ed 2d 342 . "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the Brady] rule." Giglio v U.S., 405 U.S. 150, 154, 92 S.Ct. 763 , 31 L.Ed 2d 104 ; citing Napue v Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed 2d 1217. It therefore appears that the criminal record of Sharon Elaine Hamilton meets the materiality requirement, in that there is, at the very least, a reasonable possibility that evidence of her prior criminal convictions would have affected the jury's determination of Petitioners' guilt or innocence.

It seems quite clear, then, that the suppression by the prosecutor of evidence impeaching the testimony of an important

prosecution witness is violative of due process. In Alcorta v Texas, 355 U.S. 28, 78 S.Ct. 103 , 2 L.Ed 2d 9 , this Court held that suppressed evidence which would have impeached the state's star witness in a murder trial was violative of due process. In Napue v Illinois, supra, this Court held that the prosecution's suppression of information adversely affecting the credibility of the state's star witness violated the defendant's constitutional right to a fair trial. In Giglio v U.S., supra, this Court held that the prosecutor's failure to disclose evidence affecting the credibility of the chief prosecution witness violated due process and mandated that a new trial be granted.

There remains the requirement that, in order for there to have been a violation of Petitioners' right to due process, the prosecutor must have "suppressed" the evidence of Sharon Elaine Hamilton's prior criminal record. The District

Attorney refused to produce the rap sheet on grounds there was no rap sheet for Sharon Elaine Hamilton in the state's file. The trial court held that: "I don't see that they (the prosecution) have to go out and get the rap sheets." [T:26.] The Court of Appeals of Georgia held that: "...[T]he constitutional requirement of Brady is that the state produce exculpatory evidence in its files, not that the state affirmatively seek out exculpatory evidence, even though that evidence may be more accessible to the state than the defense." (See Appendix "A").

It may well be true that the District Attorney had no F.B.I. rap sheet on Sharon Elaine Hamilton. Certainly, the Petitioners have not proved and cannot prove that such a rap sheet was in the possession of the District Attorney at any time. However, Petitioners contend that evidence may be "suppressed" without being actually concealed, and that any other interpretation would be unconstitutionally narrow. With respect

to F.B.I. rap sheets on witnesses in criminal prosecutions, such rap sheets are always readily available to prosecutors, but are not accessible to defendants unless requested by some law enforcement agency. Without access to an F.B.I. rap sheet, defendants face a nearly impossible task in attempting to compile evidence of the prior criminal records of prosecution witnesses. See, Note, Pre-Trial Discovery of Conviction Records of Prosecution Witnesses, 58 Iowa Journal 1194-1220, at pp. 1199-1202. Therefore, the prosecutor always has access to this valuable impeaching evidence when he finds it suits his own purposes to obtain it. However, under the confined rulings of the Georgia Courts in this case, the prosecutor may deny a defendant access to this pool of valuable information by the simple expedient of failing to request a rap sheet. The fundamental unfairness is apparent. Further, Petitioners submit that where a prosecutor may preclude the defendant from obtaining material

evidence merely by refraining from requesting an F.B.I. rap sheet, the prosecutor has in a very real sense "suppressed" the evidence for his inaction has made it virtually impossible for the defendant to obtain evidence which might lessen his sentence or result in a verdict of innocence.

The prosecution enjoys some substantial advantages over the defendant in any criminal prosecution, particularly with respect to the prosecution's greater ability to gather information and evidence. See, Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L. Rev. 994, 1018-1019(1972). The inherent advantages already enjoyed by the prosecutor are further enhanced where the prosecutor may deny a defendant access to a valuable and possibly decisive pool of information. The effect of evidence of prior criminal convictions being available to the prosecutor but not to the defense, is to make convictions of criminal defendants more likely. Petitioners submit such a situation is contrary to

the rules of fundamental fairness and is antithetical to our system of justice.

As this Court has noted: "...the State's inherent information gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the Defendant's favor." Wardius v. Oregon, 412 U.S. 470, at 475, n.9.(1972). Further, as this Court stated in Dennis v. United States, 384 U.S. 855, at 873(1966): "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations."

In the case at Bar, and in all criminal prosecutions, the state always has ready access to information as to the prior criminal records of witnesses. Under the holdings of the various Georgia courts in this case, where it suits the prosecutor's purpose, he may deny a defendant access to this pool of information merely by taking

no action to obtain it. In the case at Bar, an F.B.I. rap sheet on Sharon Elaine Hamilton could easily have been obtained by the district attorney. However, because the district attorney would not obtain this rap sheet, Petitioners had no alternative way of obtaining the information. Thus, in a real sense the district attorney "suppressed" this information in that his refusal to take action made it impossible for Petitioners to obtain the information. As a result, Petitioners were denied a very effective means of impeaching the testimony of one of the state's chief witnesses. As a result, the likelihood of Petitioners being convicted of the crimes charged was greatly increased. This gave the prosecution an unfair and unjustifiable advantage over Petitioners in the trial of this case. Therefore, the refusal of the district attorney to obtain the F.B.I. rap sheet on witness Sharon Elaine Hamilton violated Petitioners' rights to due process under the Fourteenth Amendment.

2. The refusal of the trial court to grant a continuance for counsel for Petitioners to gather impeaching evidence as to one of the chief prosecution witnesses constituted a denial of Petitioners' rights to due process under the Fourteenth Amendment.

In response to Petitioners' Request for Production of Evidence, the district attorney produced an FBI rap sheet for James Frazier, the other chief witness for the prosecution. The rap sheet showed that James Frazier had been convicted of numerous offenses involving moral turpitude. As previously discussed, under Georgia law a witness may be impeached by evidence of prior criminal convictions involving moral turpitude. However, the witness must be impeached by presentation of certified copies of the convictions. Upon receipt of the rap sheet, Petitioners' counsel moved for a continuance so that he might obtain certified copies of the prior convictions of James Frazier. [T:8-9.] This Motion was denied by the

trial court. [T:26.] As a result of the denial of the Motion for Continuance, Petitioners were forced to proceed to trial with no practical means at their disposal to impeach the testimony of a witness who, for all intents and purposes, was the key to the state's case against Petitioners. If the jury found the testimony of James Frazier not to be credible, it is highly unlikely they would have found Petitioners guilty.

In the first instance, Petitioners submit that the manner in which the trial court applied the rules of evidence as to impeachment was in itself violative of due process. In Chambers v. Mississippi, 410 U.S. 284(1973), this Court held that a rule of evidence, in that case the hearsay rule, "...may not be applied mechanistically to defeat the ends of justice." Petitioners submit that this is just what happened in this case.

Beyond that, however, Petitioners submit that the denial of the Motion for Continuance was itself violative of due process. At the time the Motion

for Continuance was made, Petitioners were in custody. Therefore, they constituted no danger to society nor was there any reason to fear they would not be present for trial at a later date. No prejudice would have accrued to the state had a continuance been granted. No out of town witnesses were involved. The granting of a continuance was within the trial judge's discretion. In short, the worst effect of granting a continuance would have been some minor inconvenience to the district attorney and his witnesses. By denying the continuance, however, the trial judge made it impossible for Petitioners to impeach the testimony of James Frazier, at a time when it was apparent to all involved that James Frazier was subject to impeachment upon grounds that would seriously undermine his credibility as a witness. Yet the trial judge elected to proceed, and as a result the prosecution's case against Petitioners was much stronger than it would have been at a late date.

The denial of the Motion for Continuance unfairly biased the case against Petitioners. This was contrary to conscience, logic and justice. As this Court stated in Brady v. Maryland, supra, at 373 U.S. 83, at 88(1963):

Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice.

The trial court's denial of Petitioners' Motion for Continuance prevented Petitioners from obtaining devastating impeaching evidence, the existence of which was known to the trial court at the time. This certainly shaped a trial that bore heavily on Petitioners. Indeed, it shaped a trial in which the conviction of Petitioners was

substantially more likely than it would have been had Petitioners been afforded time to obtain the evidence. Therefore, the denial of the Motion for Continuance denied Petitioners their rights to a fair trial, and was violative of Petitioners' rights to due process under the Fourteenth Amendment.

3. The refusal of the district attorney to provide an F.B.I. rap sheet for Sharon Elaine Hamilton deprived Petitioners of their rights under the Sixth Amendment to fully confront the witnesses against them.

In the case of Alford v. Texas, 282 U.S. 687 (1933), this Court held that improper limitation of cross-examination of state's witnesses was violative of the right of confrontation under the Sixth Amendment. In Pointer v. Texas, 380 U.S. 400, at 403, this Court held that the Sixth Amendment right of a defendant to confront the witnesses against him is a "...fundamental right ...made obligatory on the States by the

Fourteenth Amendment." In Pointer this Court went on to state that: "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." 380 U.S. at 404. See, also, Smith v. Illinois, 390 U.S. 129(1968).

In Chambers v. Mississippi, 410 U.S. 284, at 294(1973), this Court held that:

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process...The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process."...It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal"....

In the case of Davis v. Alaska, 415 U.S. 308, at 315(1974), this Court stated that:

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is secured for defendants in state as well as federal criminal proceedings.... Confrontation means more than being allowed to confront the witness physically. "Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934(1965). Professor Wigmore stated: "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination...."

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story..., but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy

citizen to be truthful in his testimony.

It is quite apparent then that the Sixth Amendment right of a Defendant to confront the witnesses against him includes the right to fully and effectively cross-examine prosecution witnesses, as well as the right to impeach their testimony. However, in the case at Bar, the ability of Petitioners to effectively cross-examine and impeach the chief prosecution witnesses was severely and unfairly restricted.

Without an FBI rap sheet, it would, as a practical matter, be impossible for a defendant to gather comprehensive information as to the prior criminal convictions of the witness against him. As this Court recognized in Davis v. Alaska, the right to discredit a witness by introducing evidence of prior criminal convictions is a proper and constitutionally protected aspect of the right to confrontation. However, this right is illusory where a defendant lacks the practical means to obtain

this evidence. Therefore, defendants must be afforded access to information as to the criminal records of prosecution witnesses if the right to impeach prosecution witnesses is to have any real value.

The F.B.I. rap sheet on Sharon Elaine Hamilton could easily have been obtained by the district attorney in the case at Bar. Petitioners requested the District Attorney to obtain such a rap sheet. However, the district attorney refused to obtain the rap sheet, and the trial court refused to order him to do so. As a result, Petitioners were unable to obtain any information as to the prior criminal record of Sharon Elaine Hamilton. The actions of the District Attorney therefore unfairly denied Petitioners any opportunity to impeach Sharon Elaine Hamilton with evidence of prior criminal convictions.

Since only a small effort would have been required of the District Attorney to obtain the rap sheet as Petitioners requested, there was no

real justification for refusing to do so.

Therefore, the refusal of the District Attorney to obtain an FBI rap sheet for Sharon Elaine Hamilton was violative of Petitioners' rights under the Sixth Amendment to fully and effectively confront the witnesses against them.

4. The refusal of the trial court to grant Petitioners' Motion for Continuance constituted a denial of Petitioners' rights under the Sixth Amendment to confront the witnesses against them.

As previously noted herein, this Court recognized in Davis v. Alaska that the right to impeach witnesses by presenting evidence of prior criminal convictions is a necessary and important part of the right of a defendant to confront the witnesses against him. This Court has, on several occasions, held that the denial of the right to thorough and effective cross-examination is constitutional error such as to mandate reversal of criminal convictions. See, e.g.,

Pointer v. Texas, supra; Alford v. United States, supra; Smith v. Illinois, supra, et al.

In the case at Bar, the F.B.I. rap sheet for James Frazier revealed that he had numerous prior convictions for crimes involving moral turpitude. Petitioners submit that the criminal record of James Frazier casts serious doubt upon his veracity as a witness, particularly in a case where he himself might have committed a crime. There can be no doubt that, had Petitioners been afforded an opportunity to gather certified copies of James Frazier's criminal convictions, they would have done so. Had Petitioners had the certified copies of James Frazier's convictions, they would have introduced them into evidence to impeach the testimony of James Frazier and to discredit him as a witness. There can be no doubt that, had Petitioners been able to make the jury aware of James Frazier's prior criminal record, the effect of his testimony would have been drastically reduced or obviated altogether.

The trial court was aware that the rap sheet revealed a sordid criminal record on the part of James Frazier. Likewise, the trial court must have been aware that the evidence of James Frazier's criminal convictions would be favorable to Petitioners and under any rational estimation, would have a substantial impact upon the jury's minds and upon the eventual outcome of the trial. The trial court was aware that neither the State of Georgia, nor the trial court, nor the district attorney, nor society, nor any other person, persons or entity would be prejudiced if a continuance were granted to enable Petitioners to gather the impeaching evidence that was known to exist. Yet the trial court denied the Motion for Continuance.

The refusal of the trial court made it impossible for Petitioners to impeach the testimony of James Frazier upon evidence of his prior criminal convictions. The refusal to grant a continuance was without substantial

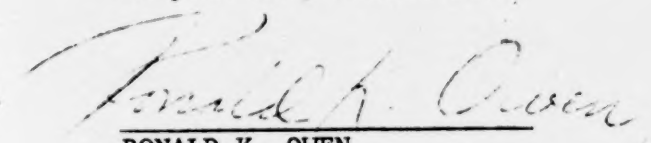
justification. Therefore, the denial by the trial court of Petitioners' Motion for Continuance constituted a violation of Petitioners' Sixth Amendment rights to confront the witnesses against them.

VII. CONCLUSION

The actions of the district attorney and the trial court made it impossible for Petitioners to impeach the testimony of the two chief witnesses against them. Since there was no substantial justification for this severe restriction of Petitioners' right to fully and effectively cross-examine the witnesses against them, the actions of the district attorney and of the trial court were violative of Petitioners' Sixth Amendment right to confront the witnesses against them. The result was a trial in which the likelihood of Petitioners' conviction was unfairly increased, and in which Petitioners were not afforded a fair opportunity to defend against the State's accusations. Petitioners were therefore denied

the fair trial that is guaranteed them under the due process clause of the Fourteenth Amendment. The convictions of Petitioners were obtained in a trial that fell far short of being the kind of fair trial which is this country's constitutional goal. Therefore, a Writ of Certiorari should issue to review the judgments herein.

Respectfully submitted:


RONALD K. OWEN
Attorney for Petitioners

APPENDIX A

OPINION OF THE GEORGIA COURT OF APPEALS

55113. JACKSON et al. v. THE STATE

The appellants, Jackson and West, were convicted and sentenced for committing armed robbery and aggravated assault. The appeal contends there was error in the state's refusal to grant a continuance and a severance, and in the admission of allegedly prejudicial evidence and comment. We affirm the convictions.

1. The defense moved for production of exculpatory evidence in the state's files, including "FBI rap sheets," obtainable by the state, which allegedly would show that two of the state's witnesses had been convicted of crimes involving moral turpitude. The state produced such a document for one of the witnesses, but replied that it did not have a "rap sheet" for the other witness. The appeal contends that the state's failure to secure and produce this document was a Brady violation (Brady v. Maryland,

373 U.S. 83 (83 SC 1194, 10 LE2d 215)(1963)) denying the appellants due process. It is clear, however, that the constitutional requirement of Brady is that the state produce exculpatory evidence in its files, not that the state affirmatively seek out exculpatory evidence, even though that evidence may be more accessible to the state than the defense. Hicks v. State, 232 Ga. 393 (207 SE2d 30)(1974). There is no evidence that this "rap sheet" existed in the state's file and was actually withheld, so there is no basis for us to find a Brady violation. Rini v. State, 236 Ga. 715(4) (225 SE2d 234)(1976).

2. Absent a showing of an abuse of discretion, this court will not reverse a trial court's refusal to grant either a continuance (Watts v. State, 142 Ga. App. 857(1) (237 SE2d 231)(1977)) or a severance. Lenear v. State, 239 Ga. 617(6) (238 SE2d 407)(1977). We find no such showing of abuse under the facts of this case.

3. Objection is made to several instances of

testimony by state witnesses and comment by state's counsel, all of which allegedly prejudiced the jury and operated to deny the appellants a fair trial. However, no objection was interposed at trial in response to any of the testimony or comment, and absent some objection invoking a ruling by the trial court there is nothing for review in this court. Brown v. State, 110 Ga. App. 401, 407 (138 SE2d 741)(1964). At any rate, we do not agree that the testimony and comment unfairly biased the trial.

Judgment affirmed. Deen, P.J., and Banke, J., concur.

APPENDIX B

DEFENDANTS' EXTRAORDINARY
MOTION FOR NEW TRIAL

NOW COME Defendants herein, and move this Court pursuant to Ga. Code Ann. §§70-301 and 303 that a New Trial be granted in this case. As grounds for said Motion, Defendants show the Court that the refusal of the Court to grant Defendants' motion for continuance, and the refusal of the State to produce a rap sheet for SHARON ELAINE HAMILTON, had the effect of denying Defendants' rights under the Sixth Amendment to the Constitution of the United States to fully and effectively confront and cross-examine the witnesses against them.

In support of this Motion, Defendants submit herewith a Memorandum in Support and the Affidavit of CHARLES M. RICHARDS, which Memorandum and Affidavit are hereby incorporated by reference herein and specifically made a part of this Extraordinary Motion for New Trial.

MEMORANDUM IN SUPPORT OF DEFENDANTS'
EXTRAORDINARY MOTION FOR NEW TRIAL

The Sixth Amendment to the Constitution of the United States provides that: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him;...." Defendants submit that they were denied their Constitutional right to fully confront the witnesses against them, and that a new trial should be granted on these grounds.

In Davis v. Alaska, 415 U.S. 308, at 315, 94 S.Ct. 1105, 39 L.Ed.2d 347(1974), the U.S. Supreme Court held:

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is secured for defendants in state as well as federal criminal proceedings... Confrontation means more than being allowed to confront the witness physically. "Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination. Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934(1965). Professor Wigmore stated: "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination...."

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad

discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story..., but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony.

In the case of Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297(1973), the Supreme Court held that:

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process....The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." Dutton v. Evans, 400 U.S. 74, 89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); Braten v. United States, 391 U.S. 123, 135-137, 88 S.Ct. 1620, 20 L.Ed.2d 476(1968). It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405, 85 S.Ct. 1065, 13 L.Ed.2d 923(1965).

It is quite clear, therefore, that the right

to a full and effective cross-examination of prosecution witnesses is a right protected under the confrontation clause of the Sixth Amendment. It is equally clear that the Supreme Court has recognized that the impeachment of prosecution witnesses by evidence of prior criminal convictions is an integral part of full and effective cross-examination.

In the case at bar, Defendants moved for a continuance so that they might have time to obtain competent, admissible evidence of the prior criminal convictions of one of the chief witnesses for the prosecution. The Court denied the motion for continuance and, in so doing, made it impossible for the Defendants to impeach the testimony of that witness by evidence of his prior criminal convictions. The denial of the motion for continuance therefore unduly restricted the Constitutional rights of Defendants to fully and effectively confront and cross-examine the witnesses against them.

Furthermore, Defendants made a motion to compel the State to produce an F.B.I. rap sheet on the other chief witness for the prosecution. The Court denied the motion. The refusal of the State to produce the rap sheet, and the denial by the Court of the motion to compel, had the effect of completely precluding the Defendants from impeaching the testimony of SHARON ELAINE HAMILTON. This also unduly restricted the Constitutional rights of Defendants to fully and effectively confront and cross-examine the witnesses against them.

These denials of Defendants' constitutional rights to confront the witnesses against them were clearly prejudicial in that, without the impeaching evidence, the jury was more likely to regard the testimony of the prosecuting witnesses as credible. Thus, the rulings of the Court made it more likely that the Defendants would be convicted. This is clearly contrary to the letter and spirit of the Constitutions of the United States and of the

State of Georgia. In Berger v. U.S., 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314(1935), the Supreme Court stated: "...the prosecuting attorney is the representative of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest therefore in a criminal prosecution is not that it shall win a case but that justice shall be done." For the State to deny criminal defendants the right to impeach prosecution witnesses by evidence of prior criminal convictions unfairly prejudices criminal trials in favor of prosecutions. To allow the State to maintain a stranglehold over official criminal records of prosecution witnesses is clearly inconsistent with all principles of justice and fairness. In Dennis v. U.S., 384 U.S. 855, 873, 86 S.Ct. 1840, 16 L.Ed.2d 973(1966) the Supreme Court stated: "In our adversary system of determination of guilt or innocence it is rarely justifiable for the prosecution to have exclusive access to a store-

house of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations."

The denial by the Court of Defendants' Motion for Continuance, and the refusal of the State to produce the rap sheet of SHARON ELAINE HAMILTON, had the effect of denying Defendants their Sixth Amendment rights to fully and effectively confront and cross-examine the witnesses against them. This undue restriction of the right to confrontation was contrary to the requirements of Constitutional due process. The convictions of Defendants were obtained in a proceeding unfairly weighted in favor of the prosecution.

Defendants submit that the mandates of the Constitutions of the United States and of the State of Georgia, as well as the principles upon which our system of justice is founded, require that a New Trial be ordered in this case.

APPENDIX C

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	:	
VS.	:	INDICTMENTS
	:	NO. A-35123
TERRY ROBERT JACKSON	:	and
and	:	NO. A-35710
STANLEY CECIL WEST	:	

ORDER DENYING PETITIONERS'
EXTRAORDINARY MOTION FOR NEW TRIAL

The above styled matter came before the Court on the Defendants' Extraordinary Motion for New Trial. The Court took the matter under advisement in order to allow the attorneys for the parties an opportunity to supplement the record with authority on the issue involved.

Upon consideration of the matter, the Court finds and concludes as a matter of law that the showing made by the movants does not demand or require that the Extraordinary Motion for New Trial be granted.

It is hereby ORDERED AND ADJUDGED THAT the defendants' Terry Robert Jackson and Stanley Cecil

West Extraordinary Motion for New Trial is denied.

This 12th day of February, 1979.

IN THE SUPREME COURT
OF THE UNITED STATES

MAY TERM, 1979
NO. _____

TERRY ROBERT JACKSON, and
STANLEY CECIL WEST,

Petitioners,

-VS-

STATE OF GEORGIA,


Respondent.

CERTIFICATE OF SERVICE

I, RONALD K. OWEN, attorney for Petitioners
herein, do hereby certify that I have served this
Petition for Writ of Certiorari upon the Respondent
herein pursuant to Rule 33(1) of this Court by
depositing three (3) copies of same in a United
States Post Office, with first class postage prepaid,
properly addressed to Respondent's counsel of record
at his post office address as follows:

Lewis R. Slaten
District Attorney of Fulton County
Fulton County Courthouse
Atlanta, Georgia 30303

This 10th day of May, 1979.


RONALD K. OWEN